

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

DANIEL BUCHANAN, as Personal)	
Representative of the Estate of)	
Michael Buchanan, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil No. 04-26-B-W
)	
STATE OF MAINE, et al.)	
)	
Defendants.)	

ORDER ON MOTION TO STRIKE

Concluding that, following the combined decisions of this Court and the United States Magistrate Judge on other pending motions, the pleadings require clarification, this Court GRANTS the State Defendants’¹ Motion to Strike Plaintiff’s “Second” Amended Complaint and ORDERS the Plaintiff to file within two weeks of the date of this Order a motion for leave to file amended complaint and proposed amended complaint in accordance with Fed. R. Civ. P. 15 (a).

I. BACKGROUND

On February 25, 2004, Daniel Buchanan filed a Complaint with this Court against the State of Maine, Lincoln County, and a number of their employees in their official and individual capacities. In response to Defendants’ motions, on September 16, 2004, Mr. Buchanan filed a Motion for Leave to File Amended Complaint. With the motion, he filed a First Amended Complaint (Docket # 32).² As regards the State Defendants, the difference between the original

¹ The State Defendants, so-called, are those employed by the State of Maine and not by Lincoln County. These include Lynn Duby, John Nicholas, Julianne Edmonson, and Joel Gilbert.

² The initial Complaint listed as a Defendant, Sabra Burdick, the then Acting Commissioner of the Maine Department of Behavioral and Developmental Services. The First Amended Complaint substituted John Nicholas for Ms. Burdick. Mr. Nicholas is the Commissioner for the recently combined Maine Department of Behavioral and

Complaint and the First Amended Complaint was found in Count VII. As originally stated, Count VII alleged a violation of 42 U.S.C. § 12182(a), Title III of the Americans with Disabilities Act of 1990 (ADA), the section prohibiting discrimination on the basis of disability in public accommodations.

As Judge Kravchuk wrote, the parties agreed Count VII as originally framed was a “non-starter.” *Order on Mot. to Amend and Rec. Dec. (Order # 1)* at 2 (Docket # 43). In its place, Mr. Buchanan sought to replace Count VII with new allegations, stating a claim under Title II of the ADA. Magistrate Judge Kravchuk issued a detailed analysis of whether, if allowed, amended Count VII would state a claim and concluded it would not. *Order # 1* at 2-9. Based on this analysis, she denied the motion for leave to amend Count VII. In her November 9, 2004 decision, she ordered Plaintiff to file by November 23, 2004 an amended complaint “that incorporates the amendments allowed by this order and the companion order contained within the recommended decision found at Docket No. 43.” *Order on Mot. to Amend and Rec. Dec. (Order # 2)* at 15 (Docket # 44). On November 17, 2004, in response to this Order, Mr. Buchanan filed a Second Amended Complaint (Docket # 46).

It is this filing that has drawn a motion to strike from the State Defendants. The Second Amended Complaint made a number of non-controversial changes consistent with the November 9, 2004 Order of the Magistrate Judge.³ The focus of the Motion to Strike, however, is a set of new allegations directed against State Defendants Edmonson and Gilbert. In the original and first amended Complaints, Mr. Buchanan alleged that Defendants Edmonson and Gilbert acted

Developmental Services and Department of Human Services, now called the Maine Department of Health and Human Services. In her decision dated November 2, 2004, Magistrate Judge Kravchuk granted Mr. Buchanan’s Motion for Leave to File Amended Complaint to reflect these changes.

³ The Second Amended Complaint differed from the First Amended Complaint in a number of respects: 1) original Count I, which had stated the claim against Lynn Duby and John Nicholas was eliminated; 2) the rephrased Count VII was excised; and 3) original Count IX, which had stated a wrongful death claim independent of original Count VIII, the Maine Tort Claims Act Count, was struck. No objection has been raised to these revisions.

with “deliberate indifference” against Michael Buchanan. *Compl.* at ¶¶ 57-61 (Docket # 1); *First Am. Compl.* at ¶¶ 66-72. Following the Recommended Decision, the Second Amended Complaint inserted new language, alleging Defendants Edmonson and Gilbert acted “without rational basis,” but “with disdain for Plaintiff and bias against him.” *Second Am. Compl.* at ¶¶ 31, 52-56, 60-66. The State points out these allegations are new and are designed to defeat dismissal of his equal protection claim. *State Def.’s Mot. to Strike* at 2 (Docket # 47). It notes Mr. Buchanan never moved or obtained approval under Fed. R. Civ. P. 15(a) to file these new allegations. *Id.* at 2-3.

Mr. Buchanan admits he substituted the equal protection standard of “without rational basis and mendacity” for the Eighth Amendment standard of “deliberate indifference,” but he states these changes were intended to “reflect the Court’s recommended decisions.” *Pl.’s Mem. in Opp’n to Def.’s Mot. to Strike* at 1-2 (Docket # 50). Mr. Buchanan asks the court to permit the filing of the Second Amended Complaint as drafted.

II. DISCUSSION

Contemporaneous with this Order, this Court has issued a decision on the parties’ objections to the Recommended Decisions of November 2, 2004 and November 9, 2004 and the Plaintiff’s Motion for Leave to Amend Complaint. In that decision, this Court granted the Plaintiff’s Motion for Leave to Amend Complaint. That decision places the pleadings in some disarray, since the Second Amended Complaint was filed in anticipation of a general affirmation of the Recommended Decisions and omits Count VII. To clear up any confusion,⁴ this Court

⁴ One problem is that the Second Amended Complaint alleges Defendants Edmonson and Gilbert acted “without rational basis” and with “disdain” for Plaintiff and “bias against him,” language more in keeping with the equal protection theory in the First Amended Complaint’s Counts II and III. By striking the Second Amended Complaint, this new allegation disappears. However, if this Court were to deny the Motion to Strike, treat the pending motion as a motion for leave to file the Second Amended Complaint, and grant it, the Second Amended Complaint would be deemed filed and it, as drafted, does not contain Count VII in the First Amended Complaint, which this Court has separately concluded states a viable claim.

grants the Motion to Strike and allows the Plaintiff a reasonable amount of time to move for leave to file an amended complaint,⁵ setting forth the causes of action that remain following the combined decisions of this Court and the Magistrate Judge.⁶

III. CONCLUSION

This Court GRANTS State Defendants' Motion to Strike Plaintiff's "Second" Amended Complaint. However, this Court ORDERS Plaintiff to file within fourteen (14) days of the date of this Order a motion for leave to file amended complaint with a proposed amended complaint reflecting the orders of this Court, including the affirmed portions of the Recommended Decisions of the United States Magistrate Judge.

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 3rd day of March, 2005.

Plaintiff

DANIEL BUCHANAN
Personal Representative of the
ESTATE OF MICHAEL BUCHANAN

represented by **ROBERT J. STOLT**
LIPMAN, KATZ & MCKEE
P.O. BOX 1051
AUGUSTA, ME 4332-1051
207-622-3711
Email: rstolt@lipmankatzmckee.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Plaintiff

⁵ The reason this Court has ordered Plaintiff to file a motion for leave to amend complaint, rather than ordering the filing of an amended complaint, is to give the Defendants an opportunity to preserve any objections to the proposed amendment. *But see* Fed. R. Civ. P. 15 (a) (leave to amend pleadings "shall be freely given when justice so requires"); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Allendale Mut. Ins. Co. v. Rutherford*, 178 F.R.D. 1, 3 (D. Me. 1998); *Swan v. Sohio Oil Co.*, 766 F. Supp. 18, 19-20 (D. Me. 1991).

⁶ This Order in effect alters the current deadlines in the Scheduling Order. The Magistrate Judge has previously indicated that the Scheduling Order would be revisited after the final disposition of the motions to dismiss. If she concludes after consulting with the parties that a different period of time should be allowed for amendment of the pleadings and that other deadlines should be altered as well, this is clearly within her discretion.

**MICHAEL BUCHANAN,
ESTATE OF**

represented by **ROBERT J. STOLT**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

MAINE, STATE OF

represented by **CHRISTOPHER C. TAUB**
MAINE ATTORNEY GENERAL'S
OFFICE
STATE HOUSE STATION 6
AUGUSTA, ME 04333
207-626-8800
Email:
Christopher.C.Taub@maine.gov
ATTORNEY TO BE NOTICED

Defendant

LYNN DUBY

*Individually and in her official
capacity as former Commissioner of
the Maine Department of Behavioral
and Developmental Services*

represented by **CHRISTOPHER C. TAUB**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

SABRA BURDICK

*Individually and in her official
capacity as Acting Commissioner of
the Maine Department of Behavioral
and Developmental Services
TERMINATED: 11/02/2004*

represented by **CHRISTOPHER C. TAUB**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JULIANNE EDMONSON

represented by **CHRISTOPHER C. TAUB**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

JOEL GILBERT

represented by **CHRISTOPHER C. TAUB**
(See above for address)

ATTORNEY TO BE NOTICED

Defendant

LINCOLN, COUNTY OF

represented by **PETER T. MARCHESI**
WHEELER & AREY, P.A.
27 TEMPLE STREET
P. O. BOX 376
WATERVILLE, ME 04901
873-7771
Email: pbear@wheelerlegal.com
ATTORNEY TO BE NOTICED

Defendant

ROBERT EMERSON

represented by **PETER T. MARCHESI**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

KENNETH HATCH

represented by **PETER T. MARCHESI**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

**MAINE DEPARTMENT OF
HEALTH AND HUMAN
SERVICES COMMISSIONER**

represented by **CHRISTOPHER C. TAUB**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

WILLIAM CARTER

represented by **PETER T. MARCHESI**
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

SHERIFF, LINCOLN COUNTY

represented by **PETER T. MARCHESI**
(See above for address)

LEAD ATTORNEY
ATTORNEY TO BE NOTICED